PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA, Complainant, v. DUKE ENERGY PROGRESS, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

APPLICATION FOR REVIEW OF
BELLSOUTH TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA

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* Certain information in this Application for Review has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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Pursuant to 47 C.F.R. § 1.115, BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T") respectfully submits this Application for Review of the Enforcement Bureau's Memorandum Opinion and Order issued on September 21, 2021 in Proceeding No. 20-293 (the "*Bureau Order*").[1]

I. Introduction and Summary

The *Bureau Order* correctly finds that Duke Energy Progress ("Duke Progress") charged AT&T unjust and unreasonable pole attachment rates under the parties' joint use agreement ("JUA") and must refund amounts it unlawfully collected. But, contrary to the Commission's decade-long effort to eliminate artificial and outdated rate disparities that have unjustifiably forced ILECs to pay rates far higher than their competitors, aspects of the *Bureau Order* part with Commission precedent in ways that will perpetually and competitively disadvantage AT&T simply because it is an ILEC.

The *Bureau Order* lets Duke Progress demand rates from AT&T that are up to [redacted] *times* the approximately $[redacted] per pole rate Duke Progress charges AT&T's competitors for use of comparable space on the same poles based upon immutable characteristics of ILECs, costs AT&T already incurs, and a rate formula input Duke Progress would use to calculate rates *only* for AT&T.[2] Duke Progress is fully compensated at the approximately $[redacted] per pole rate it charged AT&T's competitors because the Commission's new telecom rate formula is "just,

[1] Memorandum Opinion and Order, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (EB Sept. 21, 2021) ("*Bureau Order*").

[2] *See id.* ¶ 6; *see also* Answer, Proceeding No. 20-293 (Nov. 13, 2020) ("Answer"), Ex. D at DEP000305 (Harrington Decl. ¶ 10) (listing rates Duke Progress charged CLEC and cable attachers, which average to about $[redacted] per pole).

reasonable, and fully compensatory" to the pole owner.[3] Letting Duke Progress collect rates *far* higher from AT&T will perpetuate an anti-competitive rate disparity and overcompensate Duke Progress, in contravention of the Commission's competition and deployment goals. The Commission should correct the *Bureau Order* to ensure the competitively neutral just and reasonable pole attachment rates that are essential to the Commission's longstanding work to reduce infrastructure costs, promote competition, and foster broadband deployment.[4]

The Commission should also clarify that the parties need to amend *only* the JUA's rate provision to conform to the Commission's decision—and do *not* also need to negotiate an entirely new joint use agreement as the *Bureau Order* suggests.[5] Requiring wholesale renegotiation of the JUA is outside the Commission's jurisdiction[6] and would moot much of the Commission's work on this case, which analyzes Duke Progress's rates based on the terms and conditions of *this* JUA. Negotiations for a new joint use agreement would also needlessly increase costs and the potential for additional delays and disputes, when the exact opposite is needed to further the Commission's competition and deployment goals.[7] The Commission

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[3] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole Attachment Order*"); *see also id.* at 5321 (¶ 182) (finding "no evidence" of "any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate"); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[4] *See, e.g., Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13741 (¶ 20) (2015) ("*Cost Allocator Order*") ("[W]e view pole attachment rate reform as part of the Commission's fundamental mission to advance the availability and adoption of broadband in America.").

[5] *See Bureau Order* ¶ 64(b).

[6] The Commission has authority to "terminate" the unjust and unreasonable rate provision, "substitute in the pole attachment agreement the just and reasonable" rate provision, and order refunds—not terminate an entire JUA and require its renegotiation. *See* 47 C.F.R. § 1.1407(a).

[7] *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7771 (¶ 129) (2018) ("*Third Report and*

should direct Duke Progress to promptly amend the JUA's rate provision and provide AT&T the competitively neutral rates the Commission's objectives require.

II. The *Bureau Order* Leaves an Unwarranted Rate Disparity That Undermines the Commission's Deployment and Competition Goals.

Electric utilities are required by statute to charge cable and telecommunications providers "just and reasonable" pole attachment rates.[8] For 10 years, the Commission has worked to promote competition and broadband deployment by ensuring that these "just and reasonable" rates are low and competitively neutral among ILECs, CLECs, cable companies, and other competing companies.[9] The *Bureau Order* goes only part way toward this goal, reducing but not eliminating a significant and unwarranted rate disparity. The Commission should make 3 changes to the *Bureau Order* to ensure the "consistent, cross-industry attachment rates" that encourage broadband deployment and adoption.[10] It should (1) apply the correct standard of competitive neutrality, (2) clarify that its cost-causer approach to rates requires Duke Progress to quantify relevant and recurring costs that would justify charging AT&T a rate higher than the fully compensatory new telecom rate guaranteed AT&T's competitors, and (3) require Duke Progress to calculate a per-pole rental rate for AT&T using the same generally applicable "average number of attaching entities" input that applies to all other attachers on the same poles, as required for competitive neutrality and compliance with 47 U.S.C. § 224(e).

Order") (seeking to "reduce the number of disputes"); *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) (seeking to "reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout").

[8] 47 U.S.C. § 224(b).

[9] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5316 (¶ 172).

[10] *Cost Allocator Order*, 30 FCC Rcd at 13738 (¶ 16).

A. The *Bureau Order* Applies the Wrong Standard for Reviewing Rates Charged to ILECs.

The Commission's regulations include a presumption that AT&T is similarly situated to its competitors and should pay the same just and reasonable new telecom rate guaranteed its competitors.[11] Under the presumption, which the *Bureau Order* correctly found applies here,[12] Duke Progress can charge AT&T a rate higher than the new telecom rate only if it proves by clear and convincing evidence that the JUA provides AT&T net benefits "that materially advantage[ ] [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[13]

The *Bureau Order* diverges from this standard in 3 ways. *First*, the *Bureau Order* wholly undercuts the new telecom rate presumption by finding that immutable characteristics of ILECs impose net material advantages, thus justifying higher rates. Yet, net material advantages cannot stem from an ILEC's "historic status as an [I]LEC."[14] In its 2018 *Third Report and Order*, the Commission presumed that ILECs *are* "similarly situated" to CLECs and cable companies[15] despite well-known historical facts about ILECs: for example, they obtain pole

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[11] 47 C.F.R. § 1.1413(b).

[12] *See Bureau Order* ¶ 9. Although the *Bureau Order* correctly found the new telecom rate presumption applies, it incorrectly limited the presumption's reach to time periods after January 1, 2020, the date the JUA automatically renewed. *See id.* ¶¶ 8-10. The Commission did not carve complaint proceedings into different time periods subject to different standards when it adopted the presumption; it adopted the presumption without temporal limitation to simplify disputes and accelerate rate reductions. By regulation, the presumption applies to an entire "complaint proceeding[ ] challenging utility pole attachment rates" under a newly renewed JUA, 47 C.F.R. § 1.1413(b), and it should have applied to all rental periods at issue here.

[13] 47 C.F.R. § 1.1413(b).

[14] *See Bureau Order* ¶ 44; *see also* Letter Order at 4, *Verizon Md. LLC. v. The Potomac Edison Co.*, Proceeding No. 19-355 (May 22, 2020) (competitive benefits must "derive from the terms and conditions of the joint use agreement rather than Verizon's historical status as an [I]LEC.").

[15] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also* 47 C.F.R. § 1.1413(b).

access by contract because they do not have the "statutory right of nondiscriminatory access to poles" enjoyed by their competitors;[16] their agreements include evergreen provisions to protect the existing network in light of that absence of statutory access rights;[17] and they are almost always the lowest attacher on the pole[18] because they were the *only* communications company to attach many decades ago.[19]

Letting these historic hallmarks of ILECs justify charging them higher rates, as the *Bureau Order* does, will effectively eliminate the new telecom rate presumption, as evidenced by every Enforcement Bureau decision since the Commission's 2018 *Third Report and Order*. Applying the new telecom rate presumption in this manner effectively reinstates the pre-2011 pole attachment rate regime where rates were set based on "the regulatory classification of pole attachers" rather than relevant costs.[20] That result would be contrary to the Commission's goal to remove the "outdated rate disparities" that "inhibit broadband deployment."[21]

Second, the *Bureau Order* compares *only* the "*contractual* rights and responsibilities" of AT&T and its competitors, while expressly dismissing acknowledged statutory and regulatory

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[16] *Pole Attachment Order*, 26 FCC Rcd at 5329-30 (¶ 207).

[17] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[18] *Id.* at 7718 (¶ 22).

[19] *See Bureau Order* ¶ 33 & n.98 (noting that AT&T's position on the pole resulted from history and finding it is "unlikely that Duke would seek to change th[at] position" given the "physical damage that would result if facilities crisscrossed mid-span."); *see also* Complaint, Proceeding No. 20-293 (Sept. 1, 2020) ("Compl."), Ex. C at ATT00045 (Peters Aff. ¶ 21); Compl. Ex. D at ATT00073-74 (Dippon Aff. ¶ 43).

[20] *Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 5); *see also National Broadband Plan* at 110 (2010) (criticizing "[d]ifferent rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider").

[21] *See Third Report and Order*, 33 FCC Rcd at 7707, 7767 (¶¶ 3, 123); *see also Pole Attachment Order*, 26 FCC Rcd at 5243 (¶ 6) ("[W]idely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act.").

rights and responsibilities.[22] For example, AT&T's right to pole access under the JUA may "benefit" AT&T (as compared to no access at all), but dismissing AT&T's competitors' statutory right to pole access, which wholly offsets that "benefit," leads to a contrived and illogical conclusion that AT&T has competitively *superior* pole access rights.[23] This selective approach is factually wrong and incompatible with the Commission's pole attachment regulations and principles of competitive neutrality. AT&T is presumed to be entitled to the same new telecom rate as its competitors using the same poles *unless* it receives net material advantages over those competitors.[24] That presumption cannot be undone simply by comparing the *contract* terms that apply to AT&T versus the *contract* terms that apply to AT&T's competitors, without due regard for other realities.[25]

Third, the *Bureau Order* absolves Duke Progress of its burden to prove relevant net material competitive advantages "by clear and convincing evidence."[26] Duke Progress failed to prove that any "advantage" was *material*, as its "attempts to calculate the monetary value of the advantages … [we]re speculative and unsupported by reliable evidence."[27] Yet the *Bureau*

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[22] *See Bureau Order* ¶ 23 (emphasis in original).

[23] *See id.* ¶¶ 17-19, 21-23.

[24] The Commission's regulation does *not* refer to, let alone limit the comparative analysis to, CLEC and cable television license agreements. 47 C.F.R. § 1.1413(b); *see also Adams Telcomm'cn, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994) ("[I]t is elementary that an agency must adhere to its own rules and regulations.") (citation and quotation omitted).

[25] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5244 (¶ 8) (regulating rates charged ILECs based on evidence about "current market conditions"); *id.* at 5328 (¶ 206) (finding regulation of rates charged ILECs needed due to "current market realities").

[26] 47 C.F.R. § 1.1413(b).

[27] *Bureau Order* ¶ 43; *see also id.* ¶ 45 (finding Duke Progress's claims "controverted by evidence"); *id.* ¶ 45 n.152 (finding Duke Progress's analysis "speculative and lacking support").

Order somehow then finds the presumption rebutted anyway based on a review of the record.[28] The result is a decision that finds an "advantage"[29] even where Duke Progress admitted "ILECs are at a material *disadvantage* compared to CLECs and CATVs."[30] And, even though the Commission's new telecom rate presumption places the burden of proof on Duke Progress, the *Bureau Order* misplaces that burden and faults AT&T for failing to provide evidence it considers relevant, including information about *Duke Progress*'s own practices and intentions.[31] At the same time, the *Bureau Order* discounts or ignores unrefuted evidence AT&T offered, which proves that the JUA materially and competitively *disadvantages* AT&T as compared to other attachers on Duke Progress's poles.[32] This upside-down analysis—which holds AT&T to a higher evidentiary standard than Duke Progress and finds materiality in "advantages" the value of which Duke Progress could not quantify—is incompatible with the Commission's regulation

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[28] *Id.* ¶ 16 ("The record shows that the JUA provides AT&T with benefits that give material advantages over competitive LEC and cable attachers on the same poles.").

[29] *See id.* ¶¶ 17-19, 21-23.

[30] *See* Answer Ex. E at DEP000329 (Metcalfe Decl. ¶ 9) (emphasis added).

[31] *See, e.g., Bureau Order* ¶ 18 (faulting AT&T for "offer[ing] no evidence" that Duke Progress "is likely to" invoke a JUA provision "to AT&T's detriment."); *id.* ¶ 19 (faulting AT&T for "provid[ing] no evidence" that Duke Progress intends to terminate the JUA and preclude AT&T from attaching to new pole lines); *id.* ¶ 20 n.62 (faulting AT&T for not "cit[ing] evidence" showing that Duke Progress allows licensees to "occupy more than one foot of space" on its poles).

[32] *See, e.g., id.* ¶ 33 n.103 (discounting AT&T's evidence of higher costs due to its typical location on Duke Progress's poles). *But see* Answer ¶ 19 (admitting there are "certain costs and risks attendant to the lowest position on the pole"). *See also, e.g., Bureau Order* ¶ 29 n.88 (discounting AT&T's unique pole ownership and maintenance costs). *But see* Answer Ex. A at DEP000249 (Freeburn Decl. ¶ 10) (stating that AT&T's competitors "do not own poles" under Duke Progress's license agreements); Compl. Ex. 1 at ATT00097, ATT00100 (JUA, Arts. VII(D) & (E), VIII(A) (requiring AT&T to own and "at its own expense, maintain its Joint Use poles" and "replace such poles that become defective" or are damaged during emergencies). AT&T's pole ownership and maintenance costs are not trivial. AT&T has more than $139 million invested in poles in North Carolina and South Carolina and has expended in excess of $10 million dollars in each year covered by this dispute to own and maintain those poles. *See* Compl. Ex. A at ATT00018-19 (Rhinehart Aff., Ex. R-3).

and its *Third Report and Order*. Instead, each calls for the Commission to set the new telecom rate as the just and reasonable rate absent clear and convincing evidence from Duke Progress that AT&T receives net benefits under the JUA that "materially advantage [AT&T] over other telecommunications attachers."[33]

These foundational errors permeate the *Bureau Order*'s discussion of the 6 "advantages" it relied upon to permit an excessive and anti-competitive rate. Two of the identified "advantages"—AT&T's contractual access to Duke Progress's poles under the JUA and, after its termination, under the JUA's evergreen provision[34]—set AT&T at a material *disadvantage* compared to AT&T's competitors, which enjoy broader and permanently guaranteed statutory access to Duke Progress's poles.[35] The *Bureau Order* finds this statutory right of access irrelevant,[36] but it indisputably *disadvantages* AT&T.[37] As an ILEC, AT&T's pole access is purely pursuant to contract under the JUA.[38] And the JUA allows Duke Progress to deny AT&T access to poles Duke Progress deems unsuitable for joint use *and* to terminate—at any time and

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[33] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); 47 C.F.R. § 1.1413(b); *see also* 7A Fed. Proc., L. Ed. § 17:36 (Clear and convincing evidence is "evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.").

[34] *See Bureau Order* ¶¶ 17-19, 21-23.

[35] 47 U.S.C. § 224(f).

[36] *See Bureau Order* ¶ 23 ("Although competitive attachers have a statutory right of nondiscriminatory access to a utility's poles under section 224(f)(1), … any discussion of such a right is outside the scope of the present analysis, which necessarily compares the *contractual* rights and responsibilities of AT&T under the JUA with those of AT&T's competitors under their respective license agreements with Duke.").

[37] Answer Ex. E at DEP000329 (Metcalfe Decl. ¶ 9) ("Duke Energy Progress is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC. This represents a fundamental difference between CLECs or CATVs, as compared to ILECs. Without a contractual obligation for a utility to provide access, … ILECs are at a material disadvantage compared to CLECs and CATVs.").

[38] *See Pole Attachment Order*, 26 FCC Rcd at 5329-30 (¶ 207).

for any reason—AT&T's ability to deploy facilities on future Duke Progress pole lines.[39] Were that to occur, AT&T would need to identify, obtain permits for, and fund alternate infrastructure for its facilities without the rights and protections of the federal pole attachment scheme, significantly complicating and increasing AT&T's deployment costs.[40]

In contrast, AT&T's CLEC and cable competitors enjoy the permanent statutory right to access Duke Progress's poles that is unavailable to AT&T.[41] And, in those few cases where Duke Progress can lawfully deny CLECs and cable companies access due to insufficient pole capacity, Duke Progress has, in fact, replaced its poles so they can attach.[42] As a matter of fact and law, AT&T absolutely is not *competitively* advantaged by its far more limited contractual access to Duke Progress's poles.

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[39] *See* Compl. Ex. 1 at ATT00094, ATT00104 (JUA, Arts. II, XVII(B)).

[40] *See, e.g.*, Compl. Ex. C at ATT00047 (Peters Aff. ¶ 25); Reply Legal Analysis, Proceeding No. 20-293 (Dec. 18, 2020) ("Reply"), Ex. C at ATT00394 (Peters Reply Aff. ¶ 13); Reply Ex. F at ATT00455-456, ATT00473 (Dippon Reply Aff. ¶¶ 42, 72).

[41] *See* 47 U.S.C. § 224(f). AT&T's competitors have the right to maintain their existing attachments on Duke Progress's poles after their license agreements are terminated regardless of what the agreements say. Federal law gives them the right to install *and maintain* their facilities on Duke Progress's poles. *See id.*; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16059-60 (¶ 1123) (1996) ("*Local Competition Order*"). This is a right that "does not depend upon the execution of a formal written attachment agreement," *id.* at 16074 (¶ 1160), and that "may not be defeated by private contractual provisions," *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50).

[42] *See, e.g.*, Ex Parte Letter of Duke Energy et al. at 2, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Jan. 29, 2021) (acknowledging Duke Energy's "historical willingness to replace poles to expand capacity for attachers … rather than exercising their right to deny access for insufficient capacity under Section 224(f)(2)"); *see also* Initial Comments of Duke Energy Corp., et al. at 16-17, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84 (Sept. 2, 2020) (just 0.024% of electric utility poles required replacement in 2019 due to lack of capacity).

A third identified "advantage"—the ability to use additional space on Duke Progress's poles[43]—does not materially or competitively advantage AT&T because it and its competitors are similarly situated. The *Bureau Order* mistakenly finds otherwise by concluding that the same or substantially similar facts are an advantage when applied to AT&T but a disadvantage when applied to AT&T's competitors. Neither the JUA nor Duke Progress's license agreements restrict the amount of space an attacher may occupy.[44] The *Bureau Order* finds the silence in the JUA is an advantage for AT&T but the silence in the license agreements is a disadvantage for AT&T's competitors.[45] There is no basis for this inconsistent treatment. The *Bureau Order* points only to the conditions on AT&T's use of Duke Progress's poles (*i.e.*, "Code [requirements] are met" and AT&T's use "does not unreasonably interfere" with Duke Progress's pole use)[46] as compared to the conditions on AT&T's competitors' use of the same poles (*i.e.*, no "capacity, safety, reliability, or engineering concerns").[47] In fact, these conditions are comparable, if not more advantageous for AT&T's competitors, as "a utility may rely on industry codes, such as the NESC, to prescribe standards with respect to capacity, safety,

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[43] *Bureau Order* ¶ 20.

[44] Though the *Bureau Order* acknowledges that the JUA has no space allocation, it references Duke Progress's reliance on the space allocation in a *prior superseded* 1977 agreement. But this prior space allocation is irrelevant. The 1977 JUA ended over 20 years ago. And for the last 25 years, excess space allocations have been unlawful, unenforceable, and unobserved. *See Local Competition Order*, 11 FCC Rcd at 16079 (¶ 1170). The *Bureau Order* "rejects" the argument that an unlawful reservation of space cannot provide an advantage to the party for whom it is reserved. *Bureau Order* ¶ 19 n.59. But it is wrong in that respect. An advantage that is illusory because it cannot be enforced is no advantage at all. *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 206) (regulating rates charged ILECs based on "current market realities"); *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3756 (¶ 16) (EB 2017) ("*Dominion Order*") (clarifying that ILEC rates must be compared to "correctly calculated" new telecom rates, and not to improperly calculated rates advocated by an electric utility).

[45] *Bureau Order* ¶ 20 & n.62.

[46] *Id.* ¶ 20.

[47] *Id.* ¶ 20 n.62.

reliability and general engineering principles"[48] and AT&T is subject to an additional "no interference" condition that does not exist in its competitors' license agreements. The *Bureau Order* also does not account for the fact that federal law guarantees AT&T's competitors (but not AT&T) as much space as they require, limited only by the same narrowly construed conditions.[49]

The *Bureau Order* assumes that AT&T's competitors are limited to 1 foot of pole space based on language in the license agreements as to how rates are calculated (*i.e.*, using the Commission's presumptive 1-foot space occupied input) and an unsubstantiated allegation in Duke Progress' Answer that AT&T's competitors use no more than 1 foot of pole space.[50] Neither stands for the *Bureau Order*'s unsupported proposition that those competitors *cannot* use more than 1 foot of pole space if they need it. Indeed, the law requires they be given the space they need.[51] Yet the *Bureau Order* ignores the law and faults AT&T for failing to demonstrate that its competitors can occupy "as much space as they require."[52] This improperly placed the burden on AT&T to demonstrate the absence of an advantage when it is *Duke Progress's* burden to demonstrate the advantage's existence and materiality. Duke Progress has not met that burden. In reality, both AT&T and its competitors use about 1 foot of pole space,[53] which

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[48] *Pole Attachment Order*, 26 FCC Rcd at 5247 (¶ 11 n.31).

[49] *See* 47 U.S.C. § 224(f); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5341 (¶ 232) (narrowly construing when electric utilities may deny access for lack of capacity).

[50] *Bureau Order* ¶ 20 n.62.

[51] 47 U.S.C. § 224(f).

[52] *Bureau Order* ¶ 20 n.62.

[53] The 1-foot space occupied presumption is consistent with all recent data the Commission has relied upon about the space occupied by ILEC facilities. *See Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607, 13624 (¶ 37) (2020) ("*Potomac Edison Order*"); *FPL 2021 Order*, 36 FCC Rcd at 259 (¶ 18). Indeed, AT&T's facilities are comparable in size to its competitors' facilities, which are also presumed to occupy 1 foot of space. *See, e.g.*, Reply Ex. C at ATT00399 (Peters Reply Aff. ¶ 24); Reply Ex. D at ATT00418-419 (Dalton Reply Aff. ¶¶ 16-17); Reply Ex. E at ATT00428-29 (Oakley Reply Aff. ¶¶ 11-12).

negates any advantage from an ability to use more. AT&T and its competitors should both pay properly calculated new telecom rates based on space that is "*actually* occupied."[54]

The fourth and fifth identified "advantages"—predictable pole replacement costs and no permitting fees or requirements for new attachments[55]—also provide no real-world advantage to AT&T. Duke Progress did not prove there is a *cost* difference between the "scheduled" costs Duke Progress charges AT&T for pole replacements and the "actual" costs Duke Progress charges AT&T's competitors.[56] Instead, the JUA states that the scheduled costs reflect "*the cost*" to perform the relevant work and provides for the costs to be updated annually to reflect cost trends.[57] In other words, there is no material cost difference. And AT&T does not "pay" Duke Progress to complete permitting work because AT&T incurs the costs by performing the work itself.[58] Under prior Commission precedent, Duke Progress "may not embed in [AT&T]'s

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[54] *BellSouth Telecommunications v. Fla. Power & Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) ("*FPL 2020 Order*") (emphasis added); *see also* 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); *In Re Amend. of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12143 (¶ 77) (2001) ("*Consolidated Partial Order*") ("The statutory language prescribes that we allocate costs based on space occupied"); *id.* at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied").

[55] *Bureau Order* ¶¶ 24-30.

[56] *Id.* ¶ 26. Duke Progress instead created an artificial difference by comparing the lowest cost pole replacement under the JUA to Duke Progress's average cost to replace poles of all heights *and* to complete all associated work. *See* Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35); *see also* Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48) (stating that Duke Progress's "equipment transfer costs" are "a significant component" of its cost estimate); Reply Ex. C at ATT00406 (Peters Reply Aff. ¶ 33); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶ 10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[57] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[58] *See, e.g.*, *id.* ¶ 46 ("AT&T still must perform some of the same engineering, make-ready, and inspection work that other attachers must perform or pay others to perform before they can attach."); Reply Ex. D at ATT00413 (Dalton Reply Aff. ¶ 6) ("AT&T collects all the relevant information and performs all the necessary pre-construction and post-construction engineering,

rental rate costs that [Duke Progress] does not incur."[59] But that is exactly what the *Bureau Order* does. AT&T also performs the relevant permitting work under competitively *disadvantageous* conditions, as the JUA does not guarantee timely make-ready when other attachers must modify (*e.g.*, move or transfer) their facilities before AT&T can attach its facilities to Duke Progress's poles.[60] As a result, AT&T is uniquely subject to "excessive delays," with "limited remedies" if Duke Progress or AT&T's competitors do not promptly complete their work.[61] In contrast, AT&T's competitors are statutorily guaranteed *timely* access to Duke Progress's poles,[62] and are protected by the Commission's one-touch make-ready

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design, and inspection work when AT&T attaches facilities to the communications space on Duke Progress's poles"); *see also* Reply Ex E at ATT00426-427 (Oakley Reply Aff. ¶ 6); Reply Ex. C at ATT00403-404 (Peters Reply Aff. ¶¶ 30-31).

[59] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[60] *See* Compl. Ex. 1 at ATT00091-110 (JUA) (providing no guarantee for timely make-ready). The *Bureau Order* incorrectly states that AT&T "offer[ed] no explanation or support" for its assertion that it "often must wait longer than its competitors to begin the work it requires." *See id.* ¶ 30 n.90. Instead, AT&T explained that the delay results from its typical location on the pole and the sequential make-ready process, under which attachers move or relocate their facilities one at a time from the top of the pole down. *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7716-17 (¶ 21). As a result, "AT&T generally needs to wait for all existing attachers to sequentially visit the pole and move or relocate their attachments before AT&T can begin the work it requires to attach." Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 17); *see also* Reply Ex. C at ATT00407 (Peters Reply Aff. ¶ 36) (AT&T "typically is the last party able to transfer its facilities to [a] replacement pole because it has to wait for the other attachers to complete their transfers first").

[61] *Pole Attachment Order*, 26 FCC Rcd at 5250-51 (¶ 21) ("Evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays.... Beyond generalized problems caused by utility lack of timeliness ..., the record shows pervasive and widespread problems of delays in survey work, delays in make-ready performance, delays caused by a lack of coordination of existing attachers, and other issues."); *id.* at 5242 (¶ 3) ("The absence of fixed timelines and the potential for delay creates uncertainty that deters investment. [And], if a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies"); *see also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 17); Reply Ex. C at ATT00407 (Peters Reply Aff. ¶ 36).

[62] *See In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 25 FCC Rcd 11864, 11883 (¶ 17) (2010).

option, make-ready deadlines, and self-help remedies designed to speed their deployment and reduce their costs.[63]

The final identified "advantage"—AT&T's typical location at the bottom of the communications space[64]—is a competitive *disadvantage* due to undisputed "costs and risks attendant to the lowest position" on Duke Progress's poles.[65] The lowest position on the pole is more vulnerable to vandalism and damage and typically requires AT&T to incur higher transfer costs to move its facilities to a replaced or relocated pole.[66] It is unrefuted that AT&T's typical location—which is about 1 foot below the facilities of AT&T's competitors[67]—resulted from

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[63] *FPL 2020 Order*, 35 FCC Rcd at 5329 (¶ 14 n.56) (explaining that the Commission's one-touch make-ready regulations were adopted "so that attachment is faster and cheaper"); *see also Third Report and Order*, 33 FCC Rcd at 7714 (¶ 16) ("With OTMR ..., new attachers will save considerable time in gaining access to poles ... and will save substantial costs...."). The Commission's make-ready regulations do not protect AT&T because they define "new attacher" to mean "a cable television system or telecommunications carrier" and exclude ILECs from the definition of "telecommunications carrier." 47 C.F.R. §§ 1.1402(h), 1.1411(a)(2).

[64] *Bureau Order* ¶¶ 31-33.

[65] Answer ¶ 19; *see also* Compl. Ex. C at ATT00045-46 (Peters Aff. ¶¶ 20-23); Compl. Ex. D at ATT00073-74 (Dippon Aff. ¶ 43); Compl. Ex. 18 at ATT00234-236 (Damage Reports); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶¶ 35-36).

[66] For example, as usually the last to transfer its facilities to a replacement pole, AT&T often must make multiple trips to a pole when other attachers located higher on the pole did not transfer their facilities as scheduled. Also, when a pole leans (*e.g.*, from weather damage, normal wear and tear, or improperly engineered or constructed competitor facilities), the lowest facilities on the pole (typically, those of AT&T) can become low-hanging without notice and vulnerable to being struck by large vehicles. In addition, the lowest facilities are more vulnerable to damage by workers ascending a pole to work on higher-placed facilities. And, as the typical lowest attacher, AT&T is most likely to receive a request to temporarily raise its facilities to accommodate an oversized vehicle or a load that exceeds standard vertical clearance. *See* Compl. Ex. C at ATT00043-46 (Peters Aff. ¶¶ 17, 20-23); Compl. Ex. D at ATT00073-74 (Dippon Aff. ¶ 43); Compl. Ex. 18 at ATT00234-236 (Damage Reports); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶¶ 35-36).

[67] *See, e.g.*, Answer Ex. 7 at DEP000239. It is unclear why this 12-inch difference would let AT&T use "less expensive bucket trucks" or provide it safer or easier access, conclusory allegations the *Bureau Order* relied upon. *See Bureau Order* ¶ 32 n.97.

decades of history rather than affirmative decision-making,[68] and continues today because pole owners have required consistency in the placement of facilities to allow *all attachers* to quickly identify the ownership of facilities on a pole and avoid the physical damage that would result if facilities crisscrossed mid-span.[69]

Yet, confoundingly, the *Bureau Order* again misplaces the burden on AT&T, which it claims "has never sought to abandon its right to the lowest position in the communications space."[70] There is no evidence AT&T ever asserted a "right" to the lowest position on a pole. Nor is there evidence that Duke would permit a change in location, as the *Bureau Order* finds "it unlikely" that Duke would agree to one given "the physical damage that would result if facilities crisscrossed mid-span."[71] And, even if AT&T were able to swap pole locations with a competitor affixed higher on the pole now, it would necessarily require every communications attacher to incur rearrangement costs – and thereby increase deployment costs across-the-board,

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[68] Standard construction practices in the early days of joint use placed AT&T's facilities at the bottom of the communications space because AT&T was the only consistent communications attacher on utility poles at that time. *But see Bureau Order* ¶ 44 (competitive benefits must "stem from specific terms and conditions in the JUA, as opposed to AT&T's historic status as an [I]LEC.").

[69] *Bureau Order* ¶ 33 ("AT&T concedes that 'consistency in placement of facilities' allows 'all companies[,]' including AT&T, to readily identify the ownership of particular attachments and avoids 'physical damage that would result if facilities crisscrossed mid-span.'"); *id.* ¶ 33 n.98 ("[T]he parties' desire to avoid the physical damage that would result if facilities crisscrossed mid-span, makes it unlikely that Duke would seek to change the position of future AT&T attachments."); *see also* Compl. Ex. C at ATT00045 (Peters Aff. ¶ 21); Compl. Ex. D at ATT0007374 (Dippon Aff. ¶ 43).

[70] *Bureau Order* ¶ 33.

[71] *Id.* ¶ 33 n.98. Duke also provided no documentary evidence of the "advantages" it alleged from AT&T's location on the pole, or any cost savings associated with them. AT&T nonetheless rebutted each allegation and provided documentary support of the increased costs it incurs because of its typical position on the pole. *See, e.g.*, Compl. Ex. C at ATT00045-46 (Peters Aff. ¶¶ 20-23); Compl. Ex. D at ATT00073-74 (Dippon Aff. ¶ 43); Compl. Ex. 18 at ATT00234-236 (Damage Reports); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶¶ 35-36).

contrary to Commission policy. AT&T is not better positioned than its competitors and should not pay a higher rate because of something it cannot change without Duke's consent (which the *Bureau Order* finds "unlikely")[72] and that operates to the benefit of all attachers.

The *Bureau Order* thus identified 6 "advantages" of the JUA that are *not* real-world material competitive advantages under the Commission's standard for reviewing ILEC rates. And Duke Progress's inability to accurately quantify the value of any or all of the "advantages"[73] is fatal to any attempt to net them against AT&T's material disadvantages under the JUA. Allowing the identified "advantages" to justify competitively high pole attachment rates for AT&T, as the *Bureau Order* does, will frustrate achievement of the Commission's competition and deployment goals.[74]

B. The *Bureau Order* Does Not Ensure Duke Progress Charges Rates That Are Justified by Relevant, Quantified Costs.

The *Bureau Order* uses internally inconsistent language that Duke Progress can seize upon to demand rates that are higher than rates justified by Duke Progress's costs. While the *Bureau Order* correctly states that an electric utility can charge a rate "that *does not exceed* the Old Telecom Rate" where a JUA provides the ILEC with net material competitive benefits,[75] it also refers to the old telecom rate as *the* lawful rate without quantifying (or requiring Duke Progress to quantify) the value of any of the identified advantages.[76] But the old telecom rate is

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[72] *Bureau Order* ¶ 33 n.98.

[73] *Id.* ¶ 43 ("Duke attempts to calculate the monetary value of the advantages that the JUA provides to AT&T, but its calculations are speculative and unsupported by reliable evidence").

[74] *Third Report and Order*, 33 FCC Rcd at 7707, 7767 (¶¶ 3, 123).

[75] *See Bureau Order* ¶ 8 ("We also conclude that AT&T is entitled to a pole attachment rate that does not exceed the Old Telecom Rate.").

[76] *See id.* ¶ 64(a) ("The rate Duke may charge AT&T for attachments to Duke's poles under the JUA may equal but not exceed the Old Telecom Rate.").

an upper bound, *not* a presumptive just and reasonable, or an automatically applied, rate, even if an ILEC receives net material competitive benefits.[77] Any upward variation from the new telecom rate must be justified based on relevant costs, as an electric utility cannot lawfully recover "costs that [it] does not incur."[78] Indeed, the Commission has always placed the burden on the pole owner to justify charging a rate higher than the regulated rate, as new telecom rates are already "just, reasonable, and fully compensatory."[79]

This quantification requirement is essential to protect against "artificial, non-cost-based differences" in pole attachment rates that "are bound to distort competition."[80] By rule, the old telecom rate is about 1.5 times the new telecom rate[81]—a difference that the Commission found "sufficiently high that it hinders important statutory objectives."[82] It is especially high here, where the identified "advantages" do not impose costs on Duke Progress. Instead, the *Bureau Order* relies on "basic pole attachment" rights given AT&T by contract (for which Duke

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[77] *Potomac Edison Order*, 35 FCC Rcd at 13610 (¶ 8); *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Dominion Order*, 32 FCC Rcd at 3751-52 (¶ 4); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[78] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18); *see also, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (directing companies to determine the "appropriate rate" that "account[s] for" the value of net material competitive advantages, up to the old telecom rate); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (faulting Dominion because, "with only a few exceptions, Dominion does not quantify the purported material advantages that Verizon receives under the Joint Use Agreements"); *Verizon Fla. v. Fla. Power and Light Co.*, 30 FCC Rcd 1140, 1149 (¶ 24) (2015) (requesting "evidence showing that the monetary value of those advantages" to determine the just and reasonable rate); *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218) (providing a range of rates broad enough to "account for" possible "arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers").

[79] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183).

[80] *See AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).

[81] *See* Reply Ex. A at ATT00349 (Rhinehart Reply Aff. ¶ 5).

[82] *Pole Attachment Order*, 26 FCC Rcd at 5303 (¶ 147).

Progress is fully compensated at a new telecom rate),[83] evergreen protections not yet needed because the JUA has not been terminated and, according to the Enforcement Bureau, is "highly unlikely" ever to be[84] and which have lesser value than the broader statutory right of access AT&T's competitors enjoy in any event, the possibility AT&T may use space it does not currently use on Duke Progress's poles, permitting and pole replacement costs AT&T already incurs, and a position on Duke Progress's pole that cannot impact Duke Progress's bottom line.[85] When the Commission "cannot afford to dismiss the importance of even potentially small" rate reductions,[86] it certainly should not set the old telecom rate as the lawful rate here, where the identified advantages are so hypothetical and divorced from Duke Progress's costs.[87]

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[83] *But see Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (requiring electic utility to prove an "[I]LEC receives significant material benefits *beyond basic pole attachment* or other rights given to another telecommunications attacher") (emphasis added).

[84] *Bureau Order* ¶ 19.

[85] The *Bureau Order* mistakenly suggests that the Commission's 2018 *Third Report and Order* characterizes certain "advantages" as per se net material competitive advantages. *See, e.g.*, *Bureau Order* ¶ 19 n.59, ¶ 32 n.97, ¶ 33 n.99 (all citing *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128)). Not so. The paragraph in the Commission's 2018 *Third Report and Order* cited by the *Bureau Order* for this proposition quotes *allegations* only. *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128 & n.481) (quoting allegations from Comcast and electric utilities). The Commission required electric utilities to prove by clear and convincing evidence that they are, in fact, net material competitive advantages under the Commission's rules and orders. 47 C.F.R. § 1.1413(b); *see also Third Report and Order*, 33 FCC Rcd at 7768 (¶ 124) (stating only that "joint use agreements *may* provide benefits to the incumbent LECs" as compared to CLECs and cable attachers) (emphasis added); *see also Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 214) ("declin[ing] to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.").

[86] *See Cost Allocator Order*, 30 FCC Rcd at 13743-44 (¶ 27).

[87] *See Bureau Order* ¶ 43 (rejecting Duke Progress's valuation attempts as "speculative and unsupported by reliable evidence").

C. The *Bureau Order* Increases Rates by Adopting a Unique "Average Number of Attaching Entities" Input to Calculate Rates for AT&T, Contrary to Law.

The *Bureau Order* improperly adopts and applies a unique [redacted] attaching entities input for Duke Progress to use to calculate the rates it charges AT&T—different from the presumptive 5 attaching entities input that applies when calculating rates for AT&T's competitors to rent space on the same poles.[88] This is antithetical to the statute and the Commission's regulations and principle of competitive neutrality.

The attaching entity input determines how much unusable space is assigned to an attacher,[89] and 47 U.S.C. § 224(e) requires pole owners to divide that unusable space *equally* "among *all* attaching entities."[90] Under Section 1.1409 of the regulations, therefore, pole owners must either use the presumptive number of attaching entities to divide unusable space among all their attachers *or* rebut the presumption for "*all* attaching entities."[91] Pole owners cannot mix and match values, as the *Bureau Order* allows here, as it would require one attacher to pay a greater share of the unusable space costs, contrary to law.[92]

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[88] *See id.* ¶ 52 (recognizing that the Commission has established a rebuttable presumption of 5 attaching entities for serving areas like Duke Progress's that contain urbanized areas with a population greater than 50,000); *id.* ¶ 53 (adopting a [redacted] attaching entities input for calculating rates charged AT&T); *see also* Response to AT&T's Initial Brief at 13, Proceeding No. 20-293 (Apr. 19, 2021) (arguing that the Commission should let Duke Progress use a unique value when calculating rates for AT&T).

[89] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6800 (¶ 45) (1998) ("the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases").

[90] 47 U.S.C. § 224(e)(2) (emphasis added); 47 C.F.R. § 1.1409(a).

[91] 47 C.F.R. § 1.1409(d) (emphasis added).

[92] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd at 6802 (¶ 49) ("Congress concluded that the unusable space 'is of equal benefit to all entities attaching to the pole'") (citation omitted).

It is no mystery why Duke Progress would be motivated to single-out AT&T for a lower average number of attaching entities input. In 2015, the Commission recognized that electric utilities were artificially increasing rates by rebutting this very presumption—of average number of attaching entities—a problem it fixed by applying additional cost allocators to its new telecom rate formula.[93] But the "loophole" remains unpatched in the old telecom rate formula and allows electric utilities to demand far higher old telecom rates than could ever be justified by the value of net material competitive advantages. The Commission found an old telecom rate calculated using default inputs—at about 1.5 times the new telecom rate—would capture all possible "arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers."[94] But the *Bureau Order*—by departing from the presumptive input—provides for old telecom rates [redacted] *times* the rates Duke Progress charged AT&T's competitors. The value of net material competitive advantages does not change based the number of attaching entities on a pole; neither should the old telecom rate.

The Commission found that "lower and … more uniform pole attachment rates" can "eliminate barriers to broadband deployment, provide regulatory certainty, promote broadband deployment and competition, spur investment, and reduce significant indirect costs caused by the existing differences between the rates paid by competitors."[95] It should correct the *Bureau Order* to comply with statute, regulation, and precedent—and to achieve these goals.

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[93] *See Cost Allocator Order*, 30 FCC Rcd at 13736-38 (¶¶ 13, 16).

[94] *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218).

[95] *Id.* at 5316 (¶ 172) (alterations and quotation marks omitted).

III. The Commission Should Clarify that the Parties Need Only a New Rate Provision and Not a Whole New Agreement.

After the Commission sets the correct competitively neutral rate for AT&T's use of Duke Progress's poles under the JUA, it should clarify that the parties *only* need to amend the JUA to include the new lawful rate provision—and do *not* need to negotiate a whole new joint use agreement. The *Bureau Order* includes ambiguity on this point, as it sets the maximum rate Duke Progress "may charge AT&T for attachments to Duke's poles *under the JUA*," but then directs the parties "to negotiate *a new reciprocal joint use agreement* consistent with [its Order] that reflects proportional reciprocal rates for Duke's attachments to AT&T's poles *under the JUA*."[96]

The parties do not need an entirely new joint use agreement.[97] They and the Commission have devoted significant resources to determining the lawful rate under the JUA they already have. The Commission also does not have authority to order a wholesale revision of the JUA; its regulations instead provide authority to "[t]erminate the unjust and/or unreasonable rate" and "[s]ubstitute in the pole attachment agreement the just and reasonable rate."[98] The only term of the parties' JUA that the *Bureau Order* found unlawful was the rate term.

The Commission should, therefore, clarify that only "a new reciprocal joint use agreement [*rate provision*] consistent with" its Order is required.[99] More extensive negotiations

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[96] *Bureau Order* ¶ 64(a)-(b) (emphases added).

[97] *See Potomac Edison Order*, 35 FCC Rcd at 13618 (¶ 28) (finding "no requirement" to terminate a JUA and enter a new one in order to obtain just and reasonable rates); *see also* Potomac Edison's Opp. to Pet'n for Reconsideration and Clarification at 17, Proceeding No. 19-355 (Jan. 4, 2020) (stating that "the parties [should] modify the Joint Use Agreement to conform with the rate rulings [of the Commission], but … should not otherwise be required to renegotiate the entire agreement").

[98] 47 C.F.R. § 1.1407(a)(2).

[99] *See Bureau Order* ¶ 64(b).

would increase costs and, potentially, disputes given Duke Progress's nearly 5-to-1 pole ownership advantage, which the Enforcement Bureau found gives Duke Progress superior bargaining power to impose unjust and unreasonable rate, terms and conditions.[100] In light of the "protracted negotiations between the parties" that already "failed to produce a ... just and reasonable rate,"[101] the Commission should limit further negotiations by directing the parties to promptly amend the JUA's rate provision to conform to its Order and ordering Duke Progress to provide AT&T the lawful rate and required refunds without further delay.

IV. Conclusion

For the foregoing reasons, and those detailed in AT&T's other filings in this docket, AT&T respectfully requests that the Commission review and clarify those portions of the *Bureau Order* identified herein, and grant AT&T's Pole Attachment Complaint in full.

Respectfully submitted,

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Dated: October 21, 2021

[100] *See id.* ¶¶ 37-39.

[101] *Id.* ¶ 37.

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2021, I caused a copy of the foregoing Application for Review of BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina to be served on the following (service method indicated):

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